UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

WHITE LILLY, LLC;
JONATHAN BERNSTEIN,

Plaintiffs,

v. 18 CV 12404 (ALC)

BALESTRIERE PLLC, ET AL.,

Defendants.

----------x

New York, N.Y.
January 15, 2019
1:04 p.m.

Before:

HON. ANDREW L. CARTER, JR.,

District Judge

APPEARANCES

LAW OFFICE OF SAMUEL M. LEAF
Attorney for Plaintiffs
BY: SAMUEL MARTIN LEAF
AND
GALLAGHER LAW, PLLC
BY: BRIAN KEITH GALLAGHER

DEBEVOISE & PLIMPTON LLP
Attorneys for Defendants Balestriere PLLC; Balestriere Fariello; John Balestriere
BY: JYOTIN HAMID
AND
BALESTRIERE, FARIELLO
BY: JILLIAN LEE McNEIL

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants Adina Storch; The Law Offices of Adina G. Storch, PLLC
BY: JOSEPH L. FRANCOEUR

(In open court)

(Case called)

MR. LEAF: Good afternoon, your Honor. Sam Leaf for the plaintiffs White Lilly and Mr. Bernstein.

THE COURT: And for the defendants?

MR. HAMID: Good afternoon, your Honor. Joe Hamid of Debevoise and Plimpton for the Balestrieri parties.

MS. McNEIL: Jillian McNeil from Balestriere, Fariello for the Balistreri parties.

MR. FRANCOEUR: Good afternoon, your Honor. Joseph Francoeur for Adina Storch and the Storch Law Firm.

THE COURT: Okay. Good afternoon. Let me start off by making sure I fully understand what the plaintiffs' position is here in terms of this request for the preliminary injunction. Is the plaintiffs' belief that White Lilly should not be required to arbitrate, as well, or is it simply that Mr. Bernstein should not be required to arbitrate?

MR. LEAF: Your Honor, White Lilly is not a party to the arbitration as of yet; so we haven't addressed that full on, but we certainly reserve the right to argue that, should they be made -- should White Lilly be made part of the proceeding. But we certainly are arguing here that the arbitration ought to be enjoined as to Mr. Bernstein.

THE COURT: Okay. So let me get a little elucidation from you on that. Why is it that you claim, clearly, that the

engagement agreement that Mr. Bernstein signed doesn't make him a party to that agreement which has an arbitration clause in it?

MR. LEAF: Certainly, your Honor. In the first instance, there are three relevant agreements here, the initial engagement agreement, first amended and second amended. Those are the three documents that the defendants, or here plaintiffs in the arbitration, contend form the jurisdictional basis for bringing Mr. Bernstein in, obviously.

The first engagement agreement, the initial engagement agreement does not identify Mr. Bernstein as a party to that agreement. Second of all, at any point -- and the standard here is that if he's going to waive his right to appear in court and have his claims heard in court, it has to be clear and explicit that he has done so.

Second of all, with respect to that agreement, your Honor, the signature block on that initially read John Bernstein, comma, on behalf of himself, and I won't use the full name of the entity, but Farallon. He explicitly crossed out "on behalf of himself and Farallon," indicating that he was not agreeing to this on behalf of himself. He was the litigation funder from the managing member of the litigation funder, White Lilly.

Second of all, your Honor -- and if he was crossing out on behalf of himself personally at that point, who did

defendants think he was signing on behalf of?

THE COURT: He crossed off both of those entities. What it is, it just reads John Bernstein.

MR. LEAF: Correct.

THE COURT: He crossed off on behalf of himself --

MR. LEAF: Correct.

THE COURT: -- and on behalf of that entity.

MR. LEAF: Correct, your Honor.

THE COURT: So just go back to that. So then why does that not make him bound by this arbitration agreement?

MR. LEAF: Well, your Honor, I would argue that --

THE COURT: Or by this agreement?

MR. LEAF: Two things. One is that it's, at its very best, ambiguous as to whether he is a party here, I think. White Lilly is not mentioned in the agreement nor is Mr. Bernstein. Okay? So, you know, that's No. 1.

No. 2 is when we get to the second amended engagement agreement -- well, let me back up a little bit. The first amended engagement agreement was, I believe, in March of 2015. That's what the defendants refer to here as the operative agreement in their papers. The second amendment to the engagement agreement explicitly clarifies that Mr. Bernstein is not a party to that engagement agreement. Rather, it was White Lilly all along, and I'll read you the first paragraph of that second amended engagement agreement. It says: This letter

amends and adds to the existing agreement, the firm -- that's the Balestrieri firm -- has with -- and I'm not going to use the full name of the entity, it should be -- Farallon and White Lilly and collectively referred to herein as the parties, dated March 17, 2015, and attached hereto.

So basically, what that says is that White Lilly was a party to what the defendants are referring to as the operative agreement here all along --

THE COURT: Let's go back to the first agreement, to Exhibit B. Let's go back to that engagement agreement. Let me hear from you further as to why he's not a party to that agreement, why he didn't agree to arbitration. Whether he agreed on behalf -- tell me more as to why that's not binding on him. He signed the agreement, and you're saying he signed it just for the heck of it? Why is he signing the agreement?

MR. LEAF: Absolutely not, your Honor. And there's a number of cases that we cite that have similar circumstances to this, where a party is signing as a representative of an entity, and he was signing as a representative of White Lilly.

Now, obviously, the first engagement agreement is superseded by the second one.

THE COURT: Why do you say that? There's nothing in these agreements that say that any other agreement is superseded by the other one. It says it amends and adds to the agreement, the other existing agreement. I don't think there

was any language saying that these agreements superseded the ones that came before them, is there? Is the word superseded in there?

MR. LEAF: I don't believe it is, your Honor. But what the defendants refer to as the operative agreement here is the first amended agreement.

The second amended agreement makes absolutely clear that Mr. Bernstein all along was signing on behalf of White Lilly, and that is what he intended, certainly, and the defendants intent can be gleaned from their own language in this.

The other language that's in the second agreement is John Bernstein confirms that he has the right and authority to bind White Lilly, LLC, to the terms of the amended agreement, and John Bernstein is, in fact, binding White Lilly to such terms. So it's -- White Lilly is a party all along.

THE COURT: Well, before we get to that, again, I want to make sure I'm fully understanding what your position is as to why he is not a party to the agreement, sticking with that first agreement. He signed the agreement. Whether he signed on behalf -- whether he's really signing on behalf of some entity or really signing on his own, I'm trying to make sure I fully understand the distinction you're making, if you're making one.

Why isn't he a party to that agreement? So let's say,

hypothetically, let's say he signed on behalf of White Lilly, that's what he was signing on behalf of, and I know there's some other documents in terms of the capitalization agreement where that appears to be the case. If he's signing on behalf of White Lilly --

MR. LEAF: Correct.

THE COURT: -- and White Lilly, hypothetically speaking, is clearly a party to the agreement, then there's an arbitration clause, a broad arbitration clause, which would mean that White Lilly would be bound by that arbitration clause.

MR. LEAF: Right.

THE COURT: And as the person signing as the representative of White Lilly, why would he not be required to arbitrate on behalf of White Lilly, or is that not the position that you're taking? Are you taking the position that he should be arbitrating on behalf of White Lilly, but not on his own, not for himself personally? Are you making that sort of distinction?

MR. LEAF: I'm making the distinction that the only party here right now that's relevant in the arbitration is Mr. Bernstein, and they are seeking $14.6 million from him personally. Okay? Mr. Bernstein cannot be forced to arbitrate on behalf of himself if he is not a party to that agreement. That's under the law.

THE COURT: I guess that's what I'm trying to figure out what your position is. Is it your position that basically Mr. Bernstein is essentially two separate legal entities; he is himself as an individual, and he is himself as a representative of White Lilly or representative of some other corporation? Is that the distinction that you're making?

MR. LEAF: That is the distinction, and supported by the case law that we've cited, your Honor.

THE COURT: Then what about the provision in all of these agreements that talks about if he is signing as a representative of a corporation or some other entity, what about the portion of the agreement that says "authority"?

I don't think either side really addressed this in their briefing, but in the most recent exhibit, it's on page 3, but it occurs in all of these documents. And it reads as follows: By signing this amended agreement, or this agreement, you acknowledge and confirm that you are bound to the terms of this amended agreement and you are, in fact, bound to such terms. You also acknowledge that you personally undertake and assume the full performance hereof, including payments and amounts hereunder.

What is the purpose of that adverb "personally" there with "undertake" there?

MR. LEAF: Well, your Honor, if White Lilly is a party here and Mr. Bernstein is signing on behalf of White Lilly,

which he was, and I think the documents, particularly the second amended agreement made clear that he was, in defendant's own words, then that provision and every other provision of the contract, including the arbitration provision, simply does not apply to him because, as the case law we cited states, that agreement just does not exist as to him personally.

THE COURT: What about this "personally undertake the responsibilities of the agreement"? What about that? Even if that were an argument that I were willing to accept, what about this acknowledge that you "personally undertake and assume the full performance hereof --"?

MR. LEAF: And, your Honor --

THE COURT: -- of the terms of the agreement?

MR. LEAF: Your Honor, if Mr. Bernstein -- and this is supported by the case law that we cited. If Mr. Bernstein is signing that on behalf of White Lilly, he is only signing a contract in his representative capacity, and the terms of that contract, including the arbitration provision, simply do not apply to him. They do not apply to him because no contract exists between him personally and the law firm.

THE COURT: Even if that were a valid distinction, why wouldn't that be something for the arbitrator to resolve? Neither side -- I know the case was recent. I don't think either side really addressed the Supreme Court's recent decision from January 8th either. But why wouldn't that be

something for the arbitrator to decide?

MR. LEAF: Well, first of all, your Honor, I did read the Supreme Court decision. We didn't address it because it really deals with an exception that had been created by the courts over time to the FAA. Now, it is no longer applicable and never was applicable in this case.

Second of all, we have cited a number of cases, your Honor, that stand for the clear proposition that's been the law for decades now, and that is that if the existence of a contract -- the question is the existence of a contract. If the question is whether or not if the person signed in their representative capacity or as an individual, in other words, whether or not the contract exists as to that person individually, that is under the law an issue for the court, not the arbitrator, and we can --

THE COURT: Okay. Again, let's get back then to that first agreement, then, that first engagement agreement, the first one chronologically. Why is it that you claim he's signing it in a representative capacity there as opposed to individually? Why isn't it possible that he could be signing as both individually and in a representative capacity?

MR. LEAF: Well, your Honor, in that case, you have an ambiguous contract. Okay. It's susceptible to two different interpretations.

THE COURT: Why?

MR. LEAF: Well, maybe he's signing on behalf of himself. Maybe he's signing on behalf of an entity.

THE COURT: Why does it have to be one or the other? Why can't it be both?

MR. LEAF: Okay. Instead of having two reasonable interpretations, you have three; he signed on behalf of himself, he's signing on behalf of the entity, or he's signing on behalf of both.

THE COURT: Where would this other signing on behalf of the entity come into place, or simply signing on behalf of his own come into play, especially when he deliberately crosses out this section --

MR. LEAF: On behalf of himself.

THE COURT: -- that says on behalf of himself and this other entity?

MR. LEAF: And that was in there in error. That's not the entity he was signing on behalf of.

THE COURT: But if he's signing it, and he's specifically crossing out any limitations -- there are limitations that are included there on behalf of himself and one other named entity. It could be that he represents 50 different entities. When he's crossing that out, why isn't that clear, a clear indication that he is signing on behalf of himself and every other entity that he potentially owns or at least on his own? Why is it not a clear indication that he's

at least signing on his own?

MR. LEAF: Well, I think, your Honor, I go back to the second amended, for one. That makes clear in the language that the defendants wrote that the entities -- the parties to that agreement were, in fact, White Lilly and the law firm. Okay? That language could not be clearer.

THE COURT: I understand why you want to switch that, but getting back to that first agreement again, and I believe there's -- I'm going to find it again, but I believe the similar language is there. He's signing. He's crossed out any sort of limitation as to who he's signing on behalf of.

Assuming that he's signing -- it seems to be clear that he's signing on behalf of himself, and if you couple that with that section on authority about personally undertaking the responsibility for fulfilling the terms of the agreement, why wouldn't that be clear?

I understand you have different arguments that the second agreement and these other agreements modified this such that that is no longer the case, but can we --

MR. LEAF: Yes, your Honor.

THE COURT: -- deal with that first agreement? What is your position on the first agreement? If the first agreement, on its own, if the first agreement is not substantially modified or changed by subsequent agreements, what is your position as to whether or not, under the terms of

that agreement, he has agreed to arbitrate this dispute?

MR. LEAF: My position is he personally has not agreed to arbitrate. Here's why, your Honor. Bearing in mind that the legal standard is that if an individual is going to waive their right to go into court and agree to an arbitration, that has to be explicit. Okay? It has to be clear and not subject to speculation, conjecture. It has to be explicit. Okay? I believe the --

THE COURT: And why isn't that explicit here? I guess that's what I'm trying to figure out. Are you taking the position that the arbitration clause is not clear?

MR. LEAF: Well, that's another issue entirely.

THE COURT: Or are you saying simply because of the signature line and the fact that he signed this document and didn't specify that he was signing in his own personal capacity, that it's unclear? What is your position as to the lack of clarity? It seems to me that the arbitration clause is clear.

MR. LEAF: Your Honor, the arbitration clause actually is kind of a side issue here. Okay? The issue is whether he entered into a contract wherein -- as an individual or as a representative. If he entered into it as a representative, the arbitration and everything else doesn't exist as to him personally. That's No. 1. Okay?

No. 2, if you look at the first page of the -- let me

get the first agreement.

THE COURT: And that authority section is on page 15, by the way. That same section, talking about the personally undertaking and assuming the full performance here of, but go ahead.

MR. LEAF: Okay. The first paragraph defines who the client is. It defines it as Farallon, and it defines "you" as the parties who seek representation in this matter.

Now, bear in mind, your Honor, Mr. Bernstein is a -- the managing member of a litigation funder, White Lilly. He didn't have claims to assert in the litigation. Okay? So he wasn't seeking representation. Okay? So that's No. 1.

No. 2, if you go to -- bearing in mind the definition of "you," if you go to page 14 of that agreement, your Honor, designation of U.S. agent states: "You hereby designate Jonathan Bernstein as your exclusive authorized client representative in the United States," and it goes on. Now, if Mr. Bernstein was the client, why would he have to appoint himself his own agent? It makes no sense. If he was the client, he wouldn't need to be an agent.

THE COURT: But isn't it the case that parties can agree to arbitration even if they're not the primary parties to a contract? I think, is that what you're argument is? That this contract primarily involves these other two entities, but he's certainly affected by this, he's certainly part of this,

he's certainly taking part in what's happening here. Why isn't it sufficient that he signed this contract, he signed this agreement and that constitutes an agreement to arbitrate?

Because I know you've made a big deal about the signature line, but is there anything in here suggesting that the only people who can agree to arbitrate this dispute are the primary parties to this dispute --

MR. LEAF: Well, your Honor --

THE COURT: -- the parties to this agreement?

MR. LEAF: Is there anything suggesting in here that a non-party, that if -- let's just take it as White Lilly is the party. He signed it in a representative capacity and not in his personal capacity. If that is the case, under the law, he cannot be compelled to arbitrate.

There are very few exceptions to that, some of which -- two of which are inapplicable that the defendants have brought up here. But if he signed that agreement in his representative capacity, that contract does not exist as to him personally. And it's our contention, and I think the later agreements make very clear, that it was White Lilly that was the party to this.

And it simply doesn't make sense, for example, in the language that I just pointed out to you, that Mr. Bernstein would be both the client and appointing himself as an agent of himself. If he's an individual client, he doesn't need to be

an agent of himself. Clearly, it was an agent of a party to the contract. Okay? Mr. Bernstein --

THE COURT: And could an agent of a party to the contract agree to arbitrate?

MR. LEAF: Well, I can tell you this, your Honor, an agent of a disclosed principal -- the agent could certainly agree to arbitrate on behalf of the entity of which he is an agent, certainly.

THE COURT: Well, I'm not asking about whether or not a court could force someone, an agent of a principal or a third-party beneficiary to arbitrate because they've benefited in some way from the contract, but couldn't an agent, a non-party to the agreement, agree to arbitrate?

Why isn't that something that can happen, and why wouldn't that be lawful? Even if he's an agent of White Lilly, why couldn't he also agree to personally arbitrate, and why doesn't this document indicate a desire to do so?

MR. LEAF: Your Honor, if he's signing this on behalf of an agent, and there's one signature block -- and the document is unclear that he is, in fact -- and it is at least unclear that he is, in fact, agreeing personally to arbitrate and personally to be a party to this contract, then he has -- the document is insufficient under the law for him to be pulled into arbitration personally.

THE COURT: So then what about that clause about

authority that, again, that's in each of these documents that indicates that the people who sign this agreement personally undertake the responsibilities of it? Why doesn't that do it then?

MR. LEAF: Because, your Honor, if he's signing this document, as he was, as an agent of White Lilly, he is not signing it a second time as himself, and he is not personally agreeing to be bound by any term. And, therefore, even if it says personally in there, he is the agent. He is not representing himself, and he is not signing on behalf of himself. He is representing and signing on behalf of the entity.

And under the law, he, as a representative, signing in his representative capacity, cannot be pulled into arbitration except in very, very limited circumstances, and those aren't present here.

THE COURT: Okay. Go ahead, continue.

MR. LEAF: I think we've hit most of it.

Your Honor, I would just point out that, you know, these are their own documents. These are the documents they rely on to bring their arbitration. I think the second amended agreement makes clear and states that the first amended agreement was between White Lilly and the Balestrieri firm, and that's the language that I just read to you. It's the first paragraph of the second amended, and it states explicitly that

the amended -- first amended was between White Lilly and the law firm, not Mr. Bernstein.

If you go back to the first agreement, that is, at the very least, ambiguous. That's why we had this whole discussion about who is it that he's signing on behalf of, himself or someone else? They don't specify in the first agreement that it is Mr. Bernstein signing on behalf of him personally, and he made it clear he wasn't.

So if, under the law, if he's going to waive his right to be in court, that has to be clear and not by inference, and that's exactly what you have to do with respect to the first agreement, the initial agreement. You have to infer that he was signing on behalf of himself, rather than in a representative capacity, and that's simply insufficient under the law.

THE COURT: But aren't you doing the opposite? Aren't you asking me to infer that he is signing in a representative capacity because the actual signature line just simply says he's signing, and he scratched off both on behalf of himself and in this representative capacity?

Aren't you asking me to read more into the contract and to infer that he is signing in a representative capacity? Because that's not what's stated in that first agreement, is it? Is that stated anywhere in the first agreement?

MR. LEAF: No, your Honor, nor is it stated that he is

signing on behalf of White Lilly. The agreement is ambiguous.

THE COURT: It's not ambiguous as to the fact that he signed it. He signed on behalf of himself, isn't it?

MR. LEAF: No, he did not. And I think the first and second amended make clear that he was not signing on behalf of himself. But regardless, if you have to infer one way or another with respect to the first agreement, then you really haven't met the standard for saying that Mr. Bernstein has waived his right to go into court, he's surrendered his right to go into court.

If he's going to be pulled into an arbitration agreement, it has to be clear that, in fact, he did waive that, and he did agree to arbitrate. And if anything, that -- in many, many, many respects, the more I read the first agreement and amended agreement, it's -- the less I understand it. It's ambiguous in so many ways, but it's at least ambiguous as to whether he was signing in his representative capacity or his personal capacity.

That ambiguity is cleared up for all time with respect to the second amended agreement. That states, in no uncertain terms, and, you know, the second amended, I'll point out, also states in the signature block John Bernstein signing on behalf of White Lilly. Now, how could he amend an agreement that he entered into personally as a representative of White Lilly?

THE COURT: What? Wait. I don't follow that last

argument.

MR. LEAF: If he is signing or asked to sign the second amended agreement on behalf of White Lilly, right, and the contention is the first initial agreement was signed by Mr. Bernstein, why would he be signing on behalf of White Lilly if White Lilly wasn't the client all along?

THE COURT: Maybe because White Lilly wasn't in the first agreement.

MR. LEAF: Nor was Mr. Bernstein, and we're back to the problem.

THE COURT: Mr. Bernstein was. Mr. Bernstein signed the first agreement. There's no mention of White Lilly on the signature line of that first agreement; so wouldn't that explain why White Lilly is now being added and amended to the agreement that existed in the first agreement in terms of Mr. Bernstein personally, and now it's being made clear that Mr. Bernstein, in that second agreement, is, in addition to signing on his own capacity, is signing as a representative of White Lilly?

MR. LEAF: Your Honor, I don't believe that's the case. I think the problem you have with the first initial agreement is that it is at least ambiguous. Okay? And as I said before, you know, "you" is defined in this agreement not as Mr. Bernstein, not as White Lilly. The client is defined as Farallon and the parties seeking representation.

Mr. Bernstein wasn't seeking representation. He had no reason to seek representation. He had no rights to bring a claim with respect to the underlying actions. So it's, at the very least, ambiguous. And you have to infer that Mr. Bernstein is, as I said before, signing in his personal capacity or infer that he's signing in -- on White Lilly's behalf, in a representative capacity.

But either way, if you have to make inference and it is not explicitly clear that Mr. Bernstein is waiving his right to go to court, he's binding himself to arbitration, that doesn't meet the legal standard. That needs to be explicitly clear, not subject to speculation, not subject to inference, as we cite in our papers. And that's at least what you have to do here with respect to Mr. Bernstein personally.

THE COURT: Okay.

MR. LEAF: And I don't believe, your Honor, that we have an evidentiary record that really rebuts that. We have a hearsay declaration by an attorney, who can't really speak to the issues that she speaks to in those -- in her declaration.

The other thing, your Honor, just with respect to the two exceptions that the defendants referred to, there are five exceptions. They concede that three of them don't apply. Just as a prefatory language, the -- I'm sorry, I lost my train of thought. The typical case where a non-signatory can be in arbitration -- and I'm choosing my words carefully there -- be

in arbitration is where a non-signatory to an arbitration agreement is seeking to force a signatory to that agreement, somebody who has already agreed to arbitrate, to, in fact, arbitrate under an agreement that the party seeking arbitration has not signed.

There are circumstances where that can be obtained, when it's the inverse. When it is a signatory, as here, seeking to make a non-signatory go into arbitration when that person has not agreed, the circumstances when that -- in that case, were that to be permitted, are very, very limited and the courts scrutinize the request for that very carefully.

The two that they come up with are an agency theory. I think your Honor referred to that a few moments ago. They don't really argue agency theory in their papers. They argue a third-party beneficiary exception. That's not one of the five exceptions, and I would refer the Court to the Thompson case for the proposition that if a lower court goes outside the five boxes, the five exceptions, that's not permissible. Thompson reversed a lower court that had used a sixth exception for that very reason.

To the extent that they say they've made an agency argument, that doesn't apply. We have an agent of a known principal, a disclosed principal. In that circumstance, you can't pull the agent in. That's the law we cited, and so have they.

And then, finally, your Honor, on the estoppel argument, the kind of benefit that they've pointed to, you know, Mr. Bernstein had some say in the arbitration -- excuse me, in the litigation, that's an incidence of his being an agent of a disclosed principal. It's not a benefit, so -- that the courts would point to.

The other -- they don't point to any direct benefit to Mr. Bernstein. They do say, your Honor, that Mr. Bernstein might, as a member of White Lilly, LLC, someday see some remuneration as a consequence of the settlement agreement that was also ultimately reached. That is not the kind of direct benefit you need in order to get it. If that were permissible, then any member of any LLC, any executive of any company that had -- as the company entered into an arbitration agreement, any of those who receive remuneration as a result of something the company did could be pulled in to arbitrate. It's basically piercing the corporate veil without any showing.

So, your Honor, I think that the evidentiary record here fully supports the fact that Mr. Bernstein was signing that agreement in his representative capacity. At the very least, that initial agreement is ambiguous as to whether he was signing it on behalf of White Lilly or on behalf of himself, and if that's the case -- and the second -- the other two documents aren't ambiguous because the second amended agreement makes clear that the first amended agreement was, in fact,

between White Lilly and Balistreri firm. If that first agreement is ambiguous, as it is, then it's not enough to pull Mr. Bernstein into arbitration.

THE COURT: Okay.

MR. LEAF: Thank you.

THE COURT: Let me hear from the defendants. Who wants to go first?

MR. HAMID: Thank you, your Honor. Joe Hamid at Debevoise for the Balestrieri parties.

So, obviously, in your discussion with Mr. Leaf, were keyed in on the key issue here, which is the dispositive motion, which is, did Mr. Bernstein agree to arbitrate with defendants? Mr. Bernstein, of course, has the burden of demonstrating a likelihood of success on that issue or, on the alternative standard, sufficiently serious questions going to the merits of that issue, making fair grounds for litigation.

And he can't meet that burden because the documents he signed made it crystal clear that he did agree to arbitrate, without any ambiguity whatsoever, and if the contracts demonstrate that, and I'll just walk you through why they do in just a second, that's dispositive of the motion because, as Judge Cote held in the Custom Metal Crafters case that we cite in our papers, where, as here, you have a dispute falling within the scope of the valid arbitration agreement, it necessarily follows that there cannot be a likelihood of

success on the merits, nor is there even a sufficiently serious question going to the merits, to make them fair ground for litigation.

And the law also holds that, of course, being compelled to arbitrate when you've agreed to do so, is not any kind of harm, let alone irreparable harm.

So let's turn to that dispositive question. Did Mr. Bernstein agree to arbitrate? And let me set the stage by just emphasizing a few principles that I think are well accepted. There is the emphatic national policy in favor of arbitration embodied in the Federal Arbitration Act and multiple cases of the Supreme Court and the Second Circuit, and for that reason, binding precedent says that we hold the parties to their arbitration agreements, we construe them as broadly as possible, and we resolve all doubts about scope in favor of arbitrability.

The other principle is that this is ultimately an issue of contract. So let's look at the two contracts that my clients signed with Mr. Bernstein, and I think those documents really are the beginning and the end of this analysis because, reviewing their clear and unambiguous terms and applying black letter principle of contract law, there's simply no legitimate reason to say we didn't arbitrate.

The first contract we looked at is Exhibit B to the McNeil declaration. That's the November 20th, 2014, engagement

letter, the initial engagement letter, and I'll just point out a couple of things about it. No. 1, it's addressed, on page 1 to John Bernstein at a Bernstein Corp.com e-mail address, not any White Lilly address.

In the first sentence it does define Company, capital C, and Client, capital C, as Farallon, but then it goes on to define "you" more broadly, to include the parties or -- party or parties who seek representation in your matter.

Then, of course, if you flip to page 16, that's where you find the signatures, and I know much has been made of the fact that Mr. Bernstein crossed out "on behalf of himself," but as your Honor pointed out, he actually crossed out the whole phrase "on behalf of himself and Farallon, leaving what is not remotely ambiguous. You've got a signature line that says underneath it "John Bernstein" and then he signs "John Bernstein." I don't see any ambiguity about whether or not John Bernstein signed this signature for John Bernstein. It's crystal clear on its face. He also happened to initial every page of the document.

He has individual rights and obligations under this agreement. We looked at only part of them in your discussion with Mr. Leaf, but that section on page 14, designation of agent, actually gives him very significant rights. It gives him the right to veto the decisions of other signatories to this agreement and be the exclusive litigation director and

manager of case strategy. That's a right that he has personally under this agreement.

And then, of course, you have the arbitration provision, which is on page 15, which is notably broad in scope. It's not limited to any subject matter. It's not limited to disputes with Clients, capital C. It's not even limited to disputes with "you," the defined term "you." It's any parties, lower case P, agree to arbitrate their disputes and any claims among or between them. So that clearly covers any disputes among any of the people who signed this agreement.

And then, finally but critically, this document doesn't mention White Lilly anywhere in it. Those words simply do not appear in the document. So the idea that this is ambiguous as to whether it may be on behalf of White Lilly doesn't make any sense. You look at ambiguity within the four corners of the document. You don't guess or speculate about other things, maybe he's signing on behalf of the man on the moon. You don't do that. You look at the four corners of the document.

Now, this agreement was amended and restated, and that's Exhibit C to Ms. McNeil's declaration, and I won't go through all of the same provisions. It's very, very similar, but it's very similar points, addressed to John Bernstein at his Bernstein Corp.com e-mail address, not White Lilly. "You" defined to go just beyond the, capital C, Client but other

parties seeking representation, the same provision on page 14 that gives Mr. Bernstein individual -- significant individual rights and obligations under this agreement.

And then now on the signature block, it couldn't be more clear. Here, we don't even have any issue about crossing out entities or entities. You've just got a signature set up to be John Bernstein and signed by John Bernstein.

So I think -- and so that's the operative agreement, it remains the operative agreement. I think the bold statement repeated over and over in Mr. Bernstein's litigation papers that White Lilly signed this contract -- and, again, I forgot to point out, that contract also doesn't have the words White Lilly in it anywhere -- that White Lilly signs this contract and Mr. Bernstein didn't, is frankly just unsustained.

Mr. Bernstein is clearly a party to this agreement. Whether he's the client or the agent, that's a sideshow. He's signed this agreement. He's a party to the agreement. He's certainly, lower case P, party as used in the arbitration agreement, and he clearly and unambiguously agreed to arbitrate disputes.

Now, I know Mr. Bernstein tries to create an ambiguity by pointing to two additional documents, the capitalization agreement, to which defendants were not parties, and then this so-called second amended engagement letter, which Mr. Bernstein expressly declined to sign.

But trying to rely -- first of all, before we even get to talking about what's in those documents, the clear black letter principle is that you don't rely on documents outside of the four corners of the contract to create an ambiguity. Black letter law is that you look to rule 11 outside of the contract only if the contract is ambiguous. Then you look to outside documents to see if you can resolve that ambiguity.

Here, the operative engagement letter, Exhibit C, is not ambiguous at all on this point. If John Bernstein signed it for John Bernstein, where is the ambiguity? As I say, you don't go looking outside. You point to an ambiguity within the contract about it, and it simply is not there.

So no reason to be considering outside documents anyway. By the way, these documents, Exhibit C and Exhibit B, do have entire agreement clauses. These are fully integrated documents.

But even if one were to consider, which one should not, these two documents that Mr. Bernstein relies on, they wouldn't do anything to change the fact that Mr. Bernstein agreed to arbitrate disputes.

The capitalization agreements, that sets forth his understanding with Mr. Diaz Rivera. The defendants, the Balestrieri parties, the Storch parties, are not even parties to that agreement. And so whatever arrangement he may have with Mr. Diaz Rivera about how he's going to fund part of this

litigation or what entity he's setting up to receive the benefits of this litigation, that has nothing to do with us and has nothing to do with construing the clear and unambiguous terms of our agreement. The scope of those documents, the subject matter of those documents are just different.

As to the addendum, what Mr. Leaf was calling the second amended engagement letter, Mr. Bernstein declined to sign it. So he's hard-pressed now to argue that a document he consciously declined to sign should be accepted by this Court as undoing his clear and unambiguous commitment under the operative agreement to arbitrate disputes with the defendants.

In addition, unlike the initial engagement letter and the operative engagement letter, the amended and restated one, the proposed amendment does not include an entire agreement clause. Rather, it says, right on page 1, that we're reconfirming our obligations under the March 2015 agreement. It's not superseding. It's adding to. And so just as your Honor said in one of your questions to Mr. Leaf, if anything, that document adds White Lilly as an additional party, but it certainly doesn't take away the fact that the previous document, the March 2015, is a clear and unambiguous promise by Mr. Bernstein that he would arbitrate disputes.

There's an independent reason that the motion should be denied, and your Honor touched on this in some of the colloquy with Mr. Leaf, and that is that the motion should be

denied from the outset because the whole question of arbitrability is actually for the arbitrator, in this circumstance, to decide and, respectfully, not for the Court.

This whole thing should be delegated to the arbitrator to decide. The law is that the question of arbitrability is generally for the courts, not the arbitrator, to determine unless the parties clearly and unmistakably delegate that authority to the arbitrator to make that determination. And there is directly on point Second Circuit precedent saying that where, as here, you have an arbitration agreement that incorporates the commercial arbitration rules for the American Arbitration Association, that is clear and unmistakable evidence that the parties have chosen to delegate to the arbitrator instead of to the Court the question of determining the arbitrator's jurisdiction, the scope of the arbitration, the whole question of arbitrability.

Now, Mr. Leaf has argued, and the papers argue, that that's only about -- that doesn't apply to determining scope as to parties within the arbitration. That's not so. That distinction is not correct. First of all, the Second Circuit case that we're relying on here, Contact, was itself about whether a party was bound by an arbitration provision or not. And that's the case that when you got an adoption of commercial arbitration rules, it's for the arbitrator to make that determination about whether the party is in or out of the

arbitration.

What the cases that are cited in Mr. Bernstein's brief actually say, and I'm talking about the McKenna Long case and the National Union Fire Insurance case, is if you've got a question about whether someone who isn't even mentioned in the contract, whether that person can be pulled into the arbitration, that's a question for the courts and not the arbitrator.

But, obviously, that's not the situation here. Mr. Bernstein is more than mentioned. He's the only party mentioned. White Lilly is the party that isn't mentioned. And so for that reason, as well, this whole issue has been delegated to the arbitrator by the clear and unambiguous language of the contract, and that's an independent reason to deny the motion and, in fact, compel arbitration.

I don't think it's necessary for me to go into those exceptions. I can touch on them very briefly. There is, in the briefs, as you know, your Honor, this discussion about when a non-signatory can be bound by a signatory's arbitration agreement. We both made arguments there. I kind of think of the whole premise of that as being kind of a bizarre counter-factual because Mr. Bernstein is the signatory and White Lilly is the party that's not the signatory.

But even if we flipped reality on his head, as Mr. Bernstein's argument seeks to do, and so even if we accept

the bizarre premise that White Lilly signed and Mr. Bernstein didn't, and we were trying to see whether Mr. Bernstein could be pulled in within one of these exceptions, the answer would be yes, he can, at least under two of them.

One of them is estoppel. As your Honor held in the Grenawalt versus AT&T Mobility case., a non-signatory is estopped from denying its obligation to arbitrate if that party directly benefits from the contract containing the arbitration agreement, and it certainly does here. I pointed that out on its face, the provision on page 14, that he gets very significant rights individually under the agreement, but he benefited in other ways as well.

In the underlying litigation, he was individually a party to the master settlement agreement that ended up resolving that underlying litigation. He was represented by the Balestrieri parties and the Storch parties in that litigation in reaching that settlement, and that was work done under what we've called the operative engagement letter.

And second, his agency. Provisional principles of agency law would also bind him as a non-signatory, even if you accepted this bizarre premise that White Lilly is the signatory and Mr. Bernstein is not.

So for all of those reasons, your Honor, we think it's very, very clear that Mr. Bernstein has agreed to arbitrate. We think for that reason, the motion for preliminary injunction

should be denied, but I would go a step further and say that, for the sake of efficiency and to conserve both judicial and party resources -- I think this is within your authority to do, we've cited case law to that effect -- I think you could also enter an order simply compelling arbitration at this point of the whole matter.

Otherwise, of course, we would go through the motions of making a motion to compel arbitration, but I think that's unnecessary. I mention your Honor's JP Morgan case cited in our papers with that principle. So unless you have any questions for me, that's all I have.

THE COURT: Okay. Let me hear from the other defense counsel, if there's anything you wish to add.

MR. LEAF: Your Honor, just a point of order here. Ms. Storch is not a party to the arbitration agreement, the arbitration at all. It's a little oddly postured here that she would be putting in an opposition in a case that she's not involved in the arbitration.

MR. FRANCOEUR: Your Honor, I plan to address that.

THE COURT: Okay.

MR. FRANCOEUR: Good afternoon. My name is Joe Francoeur. I'm from the law firm of Wilson Elser. I represent Adina Storch and the law firm of Adina Storch.

I agree with Mr. Hamid. I think his points were well taken, well presented, and for the sake of brevity and for the

record, I don't need to repeat his arguments. His arguments were full and complete. I only have a few discrete points to make, but I will be very, very brief.

First of all, to the point -- plaintiffs' point that Storch defendants don't have a stake in this. That's not accurate at all. All you have to do is look at the order to show cause itself. The order to show cause says -- this is the relief it's seeking -- "enjoining the defendants," including the Storch defendants, "during the pendency of this action from arbitrating or otherwise pursuing an arbitration."

Well, that's -- of course, we have a stake in this. We, the Storch defendants, are a signatory to the agreements at issue, and we're being -- there's an attempt in the order to block us from arbitrating. So, of course, we have standing to stand here and be heard on these motions. So I don't understand that position at all when it's in the -- relief against my client is in the order to show cause itself.

A few of the other points. Again, Mr. Hamid made the points on the agreement language. It couldn't be more clear. With the Supreme Court's decision this week, I don't know what else it could do or say to say that these contracts need to be honored.

The argument that plaintiff made, that the signature is ambiguous, I've never heard that before. It doesn't make any sense to me, but I'd like to point out that plaintiffs'

counsel, time and again, refers to the second amended agreement in 2016 as clarifying all the issues. That agreement wasn't signed. So if the signature in the earlier agreement was ambiguous, how about the unsigned agreement? How is that not ambiguous? How does the 2016 change anything?

If there's any ambiguous argument, okay, look at 2016, but the truth is, and Mr. Hamid made this point, all the 2016 did was add to the earlier agreement. The language was clear. The arbitration provisions were clear. If there's any dispute between the, lower case P, parties, this has to be subject to arbitration.

And the Second Circuit decision, which I was going to talk about, but counsel did, Contact, made this very clear. If you incorporate the AAA rules, American Arbitration rules, into your agreement, then any disputes on arbitrability are not decided by the court. They're to be decided in arbitration. So I think this entire action is misplaced. We're in the wrong venue, and I join counsel's application that the Court, in its discretion, compel arbitration right now because the agreements are clear on their face. Thank you, your Honor.

THE COURT: Okay. Anything else from plaintiffs' counsel?

MR. LEAF: Just briefly, your Honor. First of all, going to the point just made a moment ago that the 2016 agreement wasn't signed. The 2016 agreement is an operative

agreement as to Farallon and with Mr. Diaz Rivera, who did sign. But what it contains is an admission as to who the parties really were to the prior agreement. You have ambiguity, in my view, and the ambiguity is clear up in the second agreement, the 2016 agreement, which says White Lilly, the funder, is the party all along.

Second of all, the capitalization agreement. That was shared with the Balestrieri -- both defendants, prior to it being signed. Therefore -- and they've admitted this in their papers. Therefore, they were aware that my client, John Bernstein, viewed the parties to that and to the engagement agreement as White Lilly and Farallon and the law firms. Why didn't they correct that misunderstanding? If at least the first agreement was ambiguous, in my view, they should have had an obligation to correct that and make clear who the client is. They didn't do that.

Oh. And, your Honor, there are cases that I think we've cited, where the issue of -- where the party who signed the agreement signed in a representative capacity. The issue is whether or not there was actually a contract, whether they had signed personally or as a representative, and the courts say that's an issue for the court in the first instance because there is a question as to whether there is even a contract, and I just wanted to point that out.

And I believe that's all I have, your Honor.

MR. FRANCOEUR: Your Honor, one last point? White Lilly did not sign the 2016 agreement. As a matter of fact, White Lilly never signed any agreement. The argument that should be made here is White Lilly is not a party to anything because they never signed an agreement. White Lilly never signed an agreement.

THE COURT: What do you mean by that? There's at least one document --

MR. FRANCOEUR: No.

THE COURT: -- where Bernstein is signing on behalf of White Lilly, correct?

MR. FRANCOEUR: That's a capitalization agreement. That's not between these parties. That's an unrelated, separate agreement about how they're going to fund their litigation. White Lilly never signed any one of these three documents.

MR. LEAF: Your Honor, one last point.

THE COURT: Yes.

MR. LEAF: If White Lilly wasn't a party to these agreements, why did White Lilly get every single invoice? Why was it sent to them?

THE COURT: All right. Well, that's beyond the scope of what I need to decide ultimately here. I'll be right back.

(Recess)

THE COURT: Okay. I find that the plaintiffs have not

met their burden of establishing irreparable harm or a likelihood of success on the merits. I will deny the preliminary injunction.

It seems to me that perhaps what we should do at this point is give the parties a briefing schedule and have the defendants, if they still wish to file a motion to compel arbitration, give them a schedule to file that motion and give the plaintiffs an opportunity to oppose that.

I don't know if the plaintiffs wish to file other motions to enjoin arbitration, but how do the parties wish to proceed? I know the defendants also expressed a desire to file a motion to dismiss the complaint. We can give you a motion schedule for that too.

If I were to grant a motion to compel arbitration, the Second Circuit has made it clear that it would then be inappropriate for me to dismiss the complaint, that it would be appropriate for me to then stay this action pending the outcome of arbitration. So how do the parties want to proceed?

MR. HAMID: Well, your Honor, if you're not inclined to give an order compelling arbitration now, we would proceed with a motion simply to compel arbitration.

MR. FRANCOEUR: I agree, and given your comments and the motion to dismiss, it seems to make sense that we would reserve our rights to do that and see how the motion to compel plays out.

THE COURT: Okay. Plaintiffs?

MR. LEAF: We're fine with setting a briefing schedule, your Honor, and in the interim, we will speak with the other parties.

THE COURT: Okay. Do the plaintiffs wish to file another motion, a motion to enjoin, or simply oppose the motion to compel arbitration?

MR. LEAF: Your Honor, could we get back to you on that? We'll talk to the defendants in the interim.

THE COURT: All right. Sure. Let's go ahead and get a briefing schedule. We'll make the schedule the same for both sides.

Can we get three weeks for the first motion, Tara?

THE DEPUTY CLERK: February 5th.

THE COURT: And then let's get three weeks for a response. It would be February 26th. And then one week for a reply, which would be when?

THE DEPUTY CLERK: March 5th.

THE COURT: Okay. So that's for all parties. So the defendants, file your motion to compel arbitration by February 5th. The plaintiffs will oppose by February 26th. The defendants, file your reply by -- is that March 5th, Tara?

THE DEPUTY CLERK: Yes.

THE COURT: And if the defendants wish to file a motion to enjoin arbitration, they should file their motion by

February 5th, with the defendants opposing by February 26th, and any reply by March 5th.

Anything else from the plaintiffs today?

MR. LEAF: No, your Honor.

THE COURT: Anything else from the defendants today?

MR. HAMID: Your Honor?

MR. FRANCOEUR: Go ahead, counsel. I'm sorry.

MR. HAMID: Just a point of clarification. I'm sorry if I'm being dense. What could be an additional motion that plaintiffs would make at this point to enjoin, in light of your Honor's ruling?

THE COURT: I'm just throwing it out there as a possibility. I wanted to give them the opportunity. I'm not sure if they wish to file any such motion. They can. I mean, obviously, this was in the context of a preliminary injunction that has been denied. That doesn't mean that, theoretically, the ultimate relief could not be granted at some point, but the preliminary injunction has certainly been denied.

MR. HAMID: Understood. Thank you.

MR. FRANCOEUR: Your Honor, the Storch defendants have not answered. I would ask that perhaps the Court could issue a ruling that it would not be compelled to answer until there's a motion on the motion to compel?

THE COURT: It seems to make sense to me.

Plaintiffs, what's your position on that?

MR. LEAF: No objection.

THE COURT: Okay. I'll stay the answer until there is a ruling on the motion to compel.

MR. HAMID: And that would be for all defendants, your Honor?

THE COURT: Correct.

MR. HAMID: Thank you.

THE COURT: Okay. Anything else we need to discuss?

MR. HAMID: No.

MR. FRANCOEUR: Not from me, your Honor.

THE COURT: Okay. All right. We're adjourned.

(Adjourned)